In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

Supreme Court, U.S.
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No. 73-696
THE EMPORIUM CAPWELL CO.,
Petitioner,
vs.
WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent.

No. 73-830
NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.
WESTERN ADDITION COMMUNITY ORGANIZATION, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia

AMICUS CURIAE BRIEF OF
RETAIL CLERKS UNION, LOCAL 1100

BARRY E. ADAMSON,
DAVID C. ROSTOV,
ROSS, ORUVEL & ROSS,
351 California Street, Suite 400,
San Francisco, California 94104,
Telephone: (415) 433-7900,
Attorneys for Amicus Curiae
Department Store Employees Union, Local 1100.

Subject Index

	Page
Statement of the facts	3
A. The employees' discharges	3
B. The events which led to the discharges	4
C. The events precedent to the leafleting	5
Argument	9
The activity engaged in by Hawkins and Hollins was protected by virtue of Section 7 of the Act and that protection was not lost because of the existence of a labor organization which represented them	9
A. Introduction	9
B. This case does not require resolution of the difficult issue concerning the reach of the "exclusivity principle"	10
C. The activity engaged in by Hawkins and Hollins did not interfere with the existing collective bargaining relationship and, therefore, they did not lose the protection of Section 7	17
Conclusion	25

Table of Authorities Cited

Cases

	Pages
Alexander v. Gardner-Denver, ___ U.S. ___, 94 S.Ct. 1011 (1974)	14
Cone Brothers Contracting Co., 158 N.L.R.B. 186	12
Gale Products, 142 N.L.R.B. 1249	14
General Electric Co., 169 N.L.R.B. 1101, enforced per curiam, 411 F.2d 750 (C.A. 9)	14
Jas H. Matthews & Co. v. N.L.R.B., 354 F.2d 432 (C.A. 8), cert. den. 384 U.S. 1002	13
Lee A. Consaul Co., Inc., 175 N.L.R.B. 547 (1969), reversed per curiam, 469 F.2d 84 (C.A. 9)	19, 20
Local 12, United Rubber Workers v. N.L.R.B., 368 F.2d 12 (C.A. 5), cert. den. 389 U.S. 837	17
Moore v. Sunbeam Corp., 459 F.2d 811 (C.A. 7)	19
N.L.R.B. v. Anchor Room Mill, 228 F.2d 775 (C.A. 5)	12
N.L.R.B. v. Draper Corp., 145 F.2d 199 (C.A. 4)	19
N.L.R.B. v. E. W. Buschman Co., 380 F.2d 255 (CA. 6), cert. den. 389 U.S. 1045	12
N.L.R.B. v. Fruit and Vegetable Packers, Local 760, 377 U.S. 58	16
N.L.R.B. v. Local Union No. 1229 (Jefferson Standard), 346 U.S. 464	15
N.L.R.B. v. Metropolitan Life Insurance Co., 380 U.S. 438	16, 17
N.L.R.B. v. Miller, 341 F.2d 870 (C.A. 2)	13, 14
N.L.R.B. v. Murray-Ohio Mfg. Co., 358 F.2d 948 (C.A. 6)	12
N.L.R.B. v. R. C. Can Co., 328 F.2d 974 (C.A. 5)	19, 23
N.L.R.B. v. Shop Rite Foods, Inc., 430 F.2d 786 (C.A. 5)	19
N.L.R.B. v. Tanner Motor Livery, Ltd., 416 F.2d 216	9, 18
N.L.R.B. v. The Magnavox Co., ___ U.S. ___, 94 S.Ct. 1099 (1974)	14
N.L.R.B. v. United Aircraft Corp., 324 F.2d 128 (C.A. 2), cert. den. 376 U.S. 951	14

	Page
N.L.R.B. v. Walton Mfg. Co., 289 F.2d 177, 180 (C.A. 5)	13
N.L.R.B. v. Wooster Division of Borg-Warner, 356 U.S. 342	22
P. R. Mallory & Co., Inc. v. N.L.R.B., 389 F.2d 704 (C.A. 7)	13
Plasti-Line, Inc. v. N.L.R.B., 278 F.2d 482 (C.A. 6)	18
Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793	13
San Juan Lumber Co., 154 N.L.R.B. 1153 (1965), affirmed per curiam, 367 F.2d 397 (C.A. 9)	20
Tanner Motor Livery, Ltd., 166 N.L.R.B. No. 35, reversed and remanded 416 F.2d 216	20
United Packinghouse Workers v. N.L.R.B., 416 F.2d 1126 (C.A.D.C.)	9
Vaca v. Sipes, 386 U.S. 171 (1967)	25
Washington State Service Employees' State Council No. 18, 188 N.L.R.B. 957	9
Western Contracting Corp. v. N.L.R.B., 322 F.2d 893 (C.A. 10)	19

Statutes

29 U.S.C., Sections 151 et seq.	2
42 U.S.C., Sections 2000e et seq.	14

Rules

Rules of Court, Rule 42	2

Texts

Cox, The Right To Engage In Concerted Activities, 26 Ind. L.J., pp. 319, 332 (1951)	21

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AMICUS CURIAE BRIEF OF DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100

This brief *amicus curiae* is filed by the Department Store Employees Union, Local 1100 (hereafter the

"Union"). The Union is the collective bargaining representative for a unit of employees who work at the retail department store in San Francisco which is operated by the Emporium Capwell Company (the "Company"). Included in this bargaining unit are the two employees, Tom Hawkins and James Hollins, whose discharges by the Company are in issue herein.

The Union files this brief in support of the view that Hawkins and Hollins were improperly discharged by the Company for engaging in activity protected by the National Labor Relations Act, as amended (29 U.S.C. §151, *et seq.*) (referred to herein as the "Act"). The Union agrees with the result of the Court of Appeals below that the Company was not privileged to discharge Hawkins and Hollins, but, as noted in later portions of this brief, disagrees with some of that Court's reasoning.[1]

The Union files this brief pursuant to Rule 42 of this Court's rules. Leave was granted by the Court for its filing, when consent could not be obtained from all party litigants.

[1]The opinion of the Court of Appeals and the opinion of the National Labor Relations Board (hereafter the "Board") are set forth in the appendix to the petition for certiorari in Case No. 73-696 and references herein to them will be designated "Pet. App." "A." refers to the separate appendix before the Court.

STATEMENT OF THE FACTS[2]

A. The employees' discharges:

Tom Hawkins and Jim Hollins, two young Black men, were employed as stock clerks by the Company; they worked as such for about two years and one year, respectfully (A. 5-6, 40-41). On November 11, 1968, they were discharged by the Company.

Each of the two employees was given an identical notification of the reasons for his discharge (Pet. App. 10, n. 18; A. 18-19, 51-52):

> You are being discharged today. Distribution of "Boycott Emporium" literature on Saturday, November 9, 1968, in front of the Emporium, 855 Market Street, S.F., pursuant to written warning dated 11/7/68 for similar action on 11/2/68.

The written warnings referred to in their discharge notices had stated the following (Pet. App. 10, n. 17; A. 106, 14-15):

> On November 2, 1968, you distributed copies of the attached statement to Negro customers and prospective customers, and to other persons passing by in front of The Emporium.
>
> These statements are untrue and are intended to and will, if continued [,] injure the reputation of The Emporium.
>
> There are ample legal remedies to correct any discrimination you may claim to exist. Therefore, we view your activities as a deliberate and unjustified attempt to injure your employer.

[2]This rather lengthy Statement of Facts is necessary because the Board, the Court of Appeals and some of the briefs to this Court have presented the facts in a manner which distorts the real isues.

> This is to inform you that you may be discharged if you repeat any of the above acts or make any similar public statement.[3]

When the employees were handed their warnings, there was no other discussion regarding the reasons for the notification (A. 14-15, 49-50).

The Union filed a grievance in behalf of the two employees, protesting their discharges pursuant to the existing collective bargaining agreement (Pet. App. 10, 103, n. 13).

B. The events which led to the discharges:

On October 22, Hawkins, Hollins and several other employees called a press conference, which was attended by representatives of various media (Pet. App. 8; A. 10-11, 47-49). The employees charged that the Company was engaging in racial discrimination and that there might be a boycott against the Company (Pet. App. 8; A. 9-11, 47-48).

On November 2, the two employees and two others distributed leaflets to members of the public entering and leaving the Company's store (Pet. App. 8-9; A. 12-14, 46-47). The employees passed out their leaflets during their own time. No store entrances were obstructed, the Company's merchandise was not

[3]The above-quoted warning was given to employee Hawkins; the warning given to Hollins was nearly identical, but, in addition, included the charge that "a public statement at a press-conference" made by Hollins, similar to the literature he distributed to the public, into the general charge of an "unjustified attempt to injure your employer" (Pet. App. 10, n. 17; A. 114, 48-50).

criticized and there was no violence or encouragement of violence (*ibid.*). The leaflets accused the Company of following discriminatory policies against various racial minorities and urged recipients "to take their money out of this racist store, until black people have full employment and are promoted justly throughout the Emporium" (Pet. App. 9; A. 107, 12-13, 46).

As noted, as a result of their distribution of leaflets on November 2, Hawkins and Hollins were given warning slips. Nonetheless, on the next Saturday, November 9, the two employees again distributed the leaflets under the same circumstances as the previous week (Pet. App. 10; A. 15-17, 50-51). And, as before, the employees passed out their leaflets in their non-working time; they were not scheduled to work on either distribution day.

C. The events precedent to the leafleting:

Before taking part in the activity which led to their discharges, Hawkins and Hollins first went to the Union with their complaint over the Company's practices of racial discrimination. On April 3, 1968, they and a group of other minority employees met with Walter Johnson, Secretary-Treasurer of the Union (Pet. App. 3-4; A. 73). Johnson was told "there were less opportunities for those who were in the minority race, not only Negroes, but we had Filippinos and all different groups represented. Among the grievances mentioned were the facts that they had probably not proper treatment from the

supervisors and also not the opportunity for promotion" (Pet. App. 4; A. 73).

The Union's then existing collective bargaining agreement with the Company provided, *inter alia* (A. 101):

> No person shall be discriminated against in regard to hire, tenure of employment, job status by reason of race, color, creed, national origin, age or sex.

Subsequent to the April 3 meeting, Secretary-Treasurer Johnson prepared a memorandum setting forth various employee complaints against the Company, including the charge of racial discrimination—"[p]robably the most important matter raised" (Pet. App. 4; A. 111). The memorandum was submitted to the Company's multi-employer organization, the San Francisco Retailers' Council (Pet. App. 4; A. 73-75, 79). Thereafter, a meeting concerning the memorandum was held between the Union and representatives from the Retailers' Council and Company (Pet. App. 4; A. 73-74).

As a result of the initial April 3 meeting, it became the official view of the Union that the Company was engaging in racial discrimination in its employment practices (Pet. App. 81; A. 78-79). Again, in early May, Johnson met with some minority employees and the Company's discriminatory practices were discussed, particularly focusing on the inability of one Black employee, Russell Young, to get a promotion (Pet. App. 4; A. 74, 78).

Several months then passed.[4] In September, Johnson and his assistant, Griffin, met again with some minority employees, including Hawkins and Hollins. Johnson informed the employees that the Union was filing discrimination charges against the Company under the bargaining contract and would take the matter to an Adjustment Board (Pet. App. 5; A. 75).[5] And, on the following day, September 4, Johnson did send a notice to the Retailers' Council which requested convening the Adjustment Board, charging the Company with violating the bargaining contract's ban on racial discrimination (Pet. App. 6; A. 80, 119).

However, at the September 3 meeting frustration was expressed by the employees. They suggested picketing the Company, but Johnson told the employees, "we [the Union] couldn't participate in any boycotting activities, that individuals could take whatever action they wanted to as long as it was legal" (Pet. App. 6; A. 81). "I said that an individual has the right to take action, but a union could not," Johnson recalled (A. 81-84). Griffin, who was also at that meeting, recalled that Johnson told the

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[4]From May to September, discussions continued, but there was some delay caused by vacation schedules of the minority employee (A. 74).

[5]The Union-Company bargaining agreement had a grievance and arbitration provision, which called for submission of disputes to an Adjustment Board and then had reference to arbitration, if the Adjustment Board could not resolve the dispute (Pet. App. 3; n. 5; A. 101-103).

employees "it was up to them to take whatever actions they wished. . . ." (A. 86).[6]

On October 16 an Adjustment Board was convened. Although Hawkins and Hollins initially attended, they refused to participate because they were dissatisfied, as it appeared to them that the Union intended on proceeding by way of individual complaints regarding discrimination, rather than on a group basis for all minorities (Pet. App. 7; A. 25, 59-60). Hollins made a statement to this effect and indicated the minority employees wanted a group solution to the problem and desired to talk with the Company's president to deal with the general problem of discrimination (*ibid.*). Around the same time as the Adjustment Board was held, Hollins had actually approached the Company's president, Mr. Batchelder, but he refused to talk with Hollins about discrimination and referred the Black employee to the Company's personnel director (Pet. App. 8; A. 64-65).

It was then some two to three weeks later that Hawkins and Hollins took their charges of Company discrimination before the public by way of their press conference and leaflet distribution. Their discharges immediately followed.

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[6]Johnson also told the employees at that time, and later when they were distributing their leaflets, that he wished they would be content with the Union's attack on discrimination through the Adjustment Board procedures (Pet. App. 5, 9-10; A. 75-76, 81-82, 86). Johnson believed that while "it is going to take a long time" to process the disputes under the contract, that procedure would "have some lasting effect," and so requested the employees to defer to the Union (A. 75-76).

ARGUMENT

THE ACTIVITY ENGAGED IN BY HAWKINS AND HOLLINS WAS PROTECTED BY VIRTUE OF SECTION 7 OF THE ACT AND THAT PROTECTION WAS NOT LOST BECAUSE OF THE EXISTENCE OF A LABOR ORGANIZATION WHICH REPRESENTED THEM.

A. Introduction:

Section 7 of the Act provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . .

There is no question that employees who band together to protest their employer's racially discriminatory practices, when such protest is based on a reasonable belief, fall within the protection of Section 7. *N.L.R.B. Tanner Motor Livery Ltd.*, 419 F.2d 216, 219 (C.A. 9); *Washington State Service Employees' State Council No. 18,* 188 N.L.R.B. 957; see also, *United Packinghouse Workers v. N.L.R.B.*, 416 F.2d 1126, 1135 (C.A.D.C.).

The Board below found that the otherwise protected activity engaged in by Hawkins and Hollins lost its protected status by virtue of the Board's application of Section 9(a) of the Act. Section 9(a) provides that a representative chosen by a majority of employees in an appropriate bargaining unit, as the Union was, "shall be the exclusive representative [ ] of all the employees in such unit. . . ." The Board determined that this principle of exclusivity

was violated by Hawkins and Hollins in two ways: (1) that they abandoned the contractual grievance procedure set forth in the Union-Company collective bargaining agreement; and (2) they were "seeking to initiate direct negotiations with [the Company] by picketing and boycott activities" (Pet. App. 55, n. 2).

The Court of Appeals disagreed. Rather, the Court below found that whatever interference was caused to the existing collective bargaining relationship between the Company and Union by the independent activity of Hawkins and Hollins, it was not "sufficient to remove these concerted activities here from the protection of the Act" (Pet. App. 24). We agree with the result reached by the Court of Appeals—that the Company's discharge of Hawkins and Hollins violated the National Labor Relations Act.

B. This case does not require resolution of the difficult issue concerning the reach of the "exclusivity principle":

Unfortunately, some elementary considerations inherent in this case have been overlooked. Thus, much of the discussion found in the opinions below centers on the question of whether the alleged desire of Hawkins and Hollins to bargain independently of the Union with the Company violated the exclusivity principle. We do not, however, believe this issue can be properly raised in the circumstances of this case.[7]

[7]Of course, Board members Jenkins and Brown, in their dissenting opinions at the Board level, found the evidence was wholly insufficient to even find there was an effort by Hawkins and Hollins to enter into bargaining with the Company (Pet. App. 58, n. 4, 75-77). We agree the evidence on this point to be seriously wanting and concur with the view: "There is not a scintilla of proof that the picketing employees wanted discussions leading to agreements on new conditions of employment, or even a modification of existing ones, or even to effect a compromise of the grievances" (Pet. App. 76-77). In this regard it is noteworthy that when Hollins actually did approach the Company president, he merely said, "I want to talk about a situation that I felt should be discussed about things that were happening among minority employees at the store" (A. 65). This one hard fact in the proceeding hardly constitutes either a bargaining proposal or demand. Indeed, the employees declined the Company's offer to meet with the personnel director (A. 64-65).

As a matter of uncontested fact, Hawkins and Hollins were not discharged for any effort to bargain with the Company. Rather, they were discharged for publicly claiming that the Company engaged in racial discrimination. Nowhere in the Company's warning notices, explanations made to the discharged employees, or in the discharge notices is there the slightest suggestion that the discharges were motivated by the employees' independent effort to bargain with the Company (*supra*, pp. 3-4). Indeed, with slight exception, the Company was not even aware of any intent to bargain on the part of Hawkins and Hollins when they were fired, and nearly all the evidence pertaining to this issue was adduced only at the Board hearing—long after the discharges.[8]

[8]The conclusion that Hawkins and Hollins desired to bargain with the Company centers essentially on private remarks regarding their desire to talk with Company President Batchelder (see Pt. App. 75). It was at the October 16 Board of Adjustment hearing where the employees, before Company representatives, announced their desire and their remarks then, some three weeks before the discharges, clearly played no role in the Company's termination action. Nor was Hollins' actual approach to the Company president even raised as a basis for the discharges (see Note 5, *supra*).

From the very outset of this proceeding, therefore, the legal issues have been confused. The principle that minority groups of employees cannot demand bargaining where they are represented by a majority representative had nothing to do with the discharge of Hawkins and Hollins. They were fired because of their demonstration and protests against discriminatory employment practices. And, it is well settled that the presence of an unprotected element in the means used to achieve the employees' object cannot serve as a defense where the employer's dissatisfaction relates solely to protected aspects of their conduct. See *N.L.R.B. v. E. W. Buschman Co.,* 380 F.2d 255, 257-258 (C.A. 6), cert. denied, 389 U.S. 1045; *N.L.R.B. v. Anchor Room Mill,* 228 F.2d 775, 782 (C.A. 5); *N.L.R.B. v. Murray-Ohio Mfg. Co.,* 358 F.2d 948, 950 (C.A. 6); *Cone Brothers Contracting Co.,* 158 N.L.R.B. 186, 212. Thus, we do not believe it can be fairly said that Hawkins and Hollins were discharged for any demand to bargain on their part.

The Board's Trial Examiner, understanding the importance of the foregoing, did make an attempt to relate the Company's discharge action to the legal issues actually raised. Noting that the "warning notice given the two employees establishes the basis on which the discharge action occurred," the Trial Examiner found that one of the two reasons given by the Company was "that they were acting outside the ample legal remedies that existed to correct any discrimination. . . ." (Pet. App. 105, n. 15). From this the Trial Examiner, with Board approval, concluded (*ibid.*):

> The reference to legal remedies is reasonably construed as meaning that their course of action lay outside the terms of the bargaining agreement which Respondent and the Union were bound to follow.[9]

The crux of the Board's finding against Hawkins and Hollins, therefore, was that their activity protesting the Company's discriminatory practices was somehow barred by the existing collective bargaining agreement. But, the conclusion is legally unwarranted on the record in this proceeding.

First, it is beyond dispute that employees have a protected right to distribute literature geared to concerted employee interests on an employer's property as long as they do so during their nonworking hours. And, where an employer either seeks to prohibit this distribution right by rule or discharge, there is clearly a violation of employee rights. *Republic Aviation Corp. v. N.L.R.B.,* 324 U.S. 793, 796-797, 801, *et seq.*; *N.L.R.B. v. Walton Mfg. Co.,* 289 F.2d 177, 180 (C.A. 5); *Jas H. Matthews & Co. v. N.L.R.B.,* 354 F.2d 432, 441 (C.A. 8), cert. denied, 384 U.S. 1002; *P. R. Mallory & Co., Inc. v. N.L.R.B.,* 389 F.2d 704, 709-710 (C.A. 7); *N.L.R.B. v*

[9]Of course, there is absolutely no evidentiary support for this conclusion. The Company never sought to explain its reference to "ample legal remedies," which obviously could have referred to various available administrative agency remedies rather than the collective bargaining contract.

Indeed, the Company previously threatened to discharge the employees for distributing leaflets (A. 14, 50). Those threats and the entire language of the dismissal letters make it clear that the discharges were for distributing leaflets, not for attempting to bargain individually with the Company.

Miller, 341 F.2d 870, 873 (C.A.2); *N.L.R.B. v. United Aircraft Corp.,* 324 F.2d 128, 129-130 (C.A. 2), cert. denied, 376 U.S. 951. Second, as this Court recently held, an existing collective bargaining agreement cannot waive the right to distribute literature during nonworking hours, as was involved here. *N.L.R.B. v. The Magnavox Co.,* ..... U.S. ....., 94 S.Ct. 1099 (1974). And see, *Gale Products,* 142 N.L.R.B. 1249. While normally the literature distribution cases deal with union campaign material rather than issues of racial discrimination, no distinction between them is warranted since they both stem from the same broad protection afforded by Section 7 and they are surely of comparable importance under our Federal labor laws. See *General Electric Co.,* 169 N.L.R.B. 1101, enforced per curiam, 411 F.2d 750 (C.A. 9).

Moreover, the Board's conclusion that Hawkins and Hollins could be compelled to make their racial protests solely through their existing contractual processes, or risk losing their jobs, is contrary to this Court's view in *Alexander v. Gardner-Denver,* ..... U.S. ....., 94 S.Ct. 1011 (1974). In *Gardner-Denver,* this Court held that an employee protesting racial discrimination was not limited to his contractual grievance and arbitration processes, but could also pursue such claims in the forums provided by Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e, *et seq.*):

> We think . . . that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII. [94 S.Ct. at 1025.]

It is difficult to see why, if an employee can proceed in legal forums outside his collective bargaining agreement, he cannot likewise publicize his dispute as well. This is especially true where, as here, the employees seek to publicize their dispute in ways which have been historically protected and safeguarded no less than the newer legal forums provided under Title VII.[10]

Board counsel have suggested to this Court, without expressly stating, that employee distribution of literature and boycott activity can be prohibited since there are alternative legal avenues in which to protest racial discrimination (Bd. Br. 26-29). But, the argument is based purely on policy contentions urged by appellate counsel, without any express basis in existing legislation. Neither Congress nor the courts have foreclosed otherwise lawful publicity campaigns simply because the issue in dispute could be subjected to legal tribunals. Furthermore, such a view would upset the delicate balance which Congress has established between specific limitations on employee

[10]It should be noted that the Board below made no finding that the employees' "boycott" activity, as distinguished from a simple racial protest, violated provisions of the Act and, we submit, no such finding would be justified. However, pursuant to the Court of Appeals decision, the Board could still consider on remand whether the boycott appeals were framed in such a way under the tests employed in *N.L.R.B. v. Local Union No. 1229 (Jefferson Standard),* 346 U.S. 464, 477-478, as to "have deprived the attackers of the protection of [Section 7 of the Act] . . . ."

picketing and the other forms of speech involved in employee appeals to the public. As noted in *N.L.R.B. v. Fruit and Vegetable Packers, Local 760,* 377 U.S. 58, 63:

> We . . . have not ascribed to Congress a purpose to outlaw peaceful picketing unless "there is the clearest indication in the legislative history," . . . that Congress intended to do so as regards the particular ends of the picketing under review. Both the congressional policy and our adherence to this principle of interpretation reflect concern that a broad ban on picketing might collide with the guarantees of the First Amendment.

In sum, the Board's decision constitutes an unwarranted conclusion that employees may no longer employ the traditionally protected right to peacefully distribute literature, where there is an existing collective bargaining agreement which contains provisions that may conceivably provide a remedy to their complaint. The Board's opinion may not come to grips with this issue, but it surely forms an important part of the Board's subliminal analysis. The Union submits that its collective bargaining agreement intended no such result and could not, in view of existing legal precepts.[11]

[11]Through the unfortunate characterization of the employee activity at stake herein as "picketing," Board counsel assert the contention that such activity violated Section 8(b)(7)(A) of the Act (Bd. Br. 37-40). Of course, such a finding is wholly novel to this proceeding for the Board itself never considered such a contention or made such a finding. To now introduce this argument is in direct conflict with this Court's admonition against *"post hoc* rationalizations" of appellate counsel, *N.L.R.B. v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 444, and would bring with it a host of considerations never considered by the government's administrative agency which is charged with the responsibility, not least of which is whether there was actual picketing within the Act's meaning. The record demonstrates there was no picketing but only distribution of handbills (A. 12, 15, 45-46, 50).

C. The activity engaged in by Hawkins and Hollins did not interfere with the existing collective bargaining relationship and, therefore, they did not lose the protection of Section 7:

It is obvious that "[t]he facts of this controversy once again present the critical challenge of striking a meaningful balance, consistent with existing labor policy, between individual employee rights and the collective bargaining process."[12] We have already discussed one key element to this balance, generally ignored in the proceedings below. However, as we move into other considerations which played a significant part in the Court of Appeals' decision, the existing circumstances and considerations continue to weigh in the favor of Hawkins and Hollins.

As the Court of Appeals noted below, the approaches to the question involved herein have been: (1) "to protect minority concerted activity, such as walkouts or picketing, whenever it is not in derogation of the union's position on the matter in question"; and (2) "to find the minority concerted activity protected only when it is not disruptive of the concept of orderly collective bargaining, regardless of whether the activity might be deemed to be supportive of the union's position." (Pet. App. 16-17). The Union agrees with the Court below that the activity of Hawkins and Hollins was not of sufficient extreme to lose the protection of the Act.

[12]*Local 12, United Rubber Workers v. N.L.R.B.*, 368 F.2d 12, 16 (C.A. 5), cert. denied, 389 U.S. 837.

Prior to the Court of Appeals decision herein, the existing Board and court precedent on the instant subject matter was somewhat ambiguous. Thus, the Ninth Circuit, in *N.L.R.B. v. Tanner Motor Livery, Ltd., supra,* 416 F.2d 216, which the Board relies on (Bd. Br. 19), held that a minority group of employees who were represented by a labor organization did not have the right to take independent action against their employer which interferes with their union's collective bargaining role. But, *Tanner* had several important links missing from the Hawkins and Hollins matter. First, there was no indication the dissident employees initially (or at any time) took their complaint to their majority representative and the Court expressly left unanswered whether this consultation would have carried forward the employees' protected rights. Second, there was no showing whatsoever as to what their labor organization's position was on the dispute. Third, the Court recommended in its remand that the Board consider whether the employer waived his right to discharge the employees when he failed to base the discharges on the ground that the picketing there was disruptive of the collective bargaining process. Accordingly, *Tanner* cannot be construed as conflicting with the Court of Appeals decision below.

Other precedent cited by the Board is likewise insufficiently in point to be of much help.[13] Except for

[13]For example, in *Plasti-Line, Inc. v. N.L.R.B.*, 278 F.2d 482 (C.A. 6), the minority group employees went on actual strike in violation of their contract's no-strike provision and their union's membership voted not to support their strike action and resulting discharges; likewise, in *Moore v. Sunbeam Corp.*, 459 F.2d 811 (C.A. 7), the discharged employee had clearly breached the existing labor contract and his union not only agreed he so breached it, but refused to support any grievance in his behalf.

Tanner, these cases primarily deal with minority employee action which either breached existing labor contracts or resulted in a "wild-cat" strike situation.[14]

On the other hand, other Board and court decisions have continued Section 7's protection for a minority group's actions which were independent of their majority labor organization. See *N.L.R.B. v. R. C. Can Co.*, 328 F.2d 974 (C.A. 5).[15] In *Western Contracting Corp. v. N.L.R.B.*, 322 F.2d 893, 899 (C.A. 10), the Court stated:

> The [minority group of] employees were entitled to engage in concerted action so long as such action was not in violation of their contract or in derogation of the position taken by their bargaining agent. The action here was clearly in

[14]*E.g., Lee A. Consaul Co. v. N.L.R.B.*, 469 F.2d 84 (C.A. 9) (wild-cat strike during negotiations and labeled "unauthorized" by the employees' labor organization); *N.L.R.B. v. Shop Rite Foods, Inc.*, 430 F.2d 786 (C.A. 5) (unauthorized strike by minority group of employees over issue not taken up by their union and action which was repudiated by the union); *N.L.R.B. v. Draper Corp.*, 145 F.2d 199, 203 (C.A. 4), where that Court noted the importance of features unique to strike action by minority employees: "It is perfectly clear not only that the 'wild-cat' strike is a particularly harmful and demoralizing form of industrial strife and unrest, the necessary effect of which is to burden and obstruct commerce, but also that it is necessarily destructive of that collective bargaining which it is the purpose of the Act to promote."

[15]While it is true, as Board counsel noted (Bd. Br. 19, n. 10), that in *Shop Rite Foods, supra,* 430 F.2d at 791, the Fifth Circuit stated that *R. C. Can* is "of doubtful viability," the Court in *Shop Rite* demonstrated significant caution in measuring the protected nature of minority group action where it is consistent with the majority representative's policies and went to lengths to inquire into the specific circumstances present in that case. Thus, we do not believe *Shop Rite Foods* can be read as overruling *R. C. Can.*

support of rather than in derogation of the union's position.

And, until this proceeding, the Board itself followed the rule that minority group action did not lose the protection of the Act where it was consistent with their union's policy or position on the issue. See *San Juan Lumber Co.*, 154 NLRB 1153 (1965), affirmed per curiam, 367 F.2d 397 (C.A. 9); *Tanner Motor Livery, Ltd.*, 166 NLRB No. 35, reversed and remanded, 416 F.2d 216 (*supra*, p. 18); *Lee A. Consaul Co., Inc.*, 175 NLRB 547 (1969), reversed per curiam, 469 F.2d 84 (*supra*, Note 12).

Turning to the factors in this proceeding, in light of the foregoing precedent, they reveal nearly a total absence of interference by Hawkins and Hollins in the existing collective bargaining relationship between the Union and Company. To begin with, Hawkins and Hollins initially went to the Union with their complaint over the Company's racial discrimination. For a time they worked solely within the Union in dealing with the problem of discrimination. And, to a certain extent they were central figures initiating action which brought the problem of discrimination to the attention of both the Union and Company.

Indeed, largely as a result of their activity, it became the Union's official position that the Company engaged in racial discrimination. Moreover, the Union-Company contract expressly prohibited discriminatory employment practices. And, both the Union and Hawkins and Hollins acted in the same direction: to eliminate the Company's discriminatory

practices, albeit through different approaches to the problem.

Two other factors are significant. The individual activity engaged in by Hawkins and Hollins was in breach of *no* provision of the existing collective bargaining agreement and there is no showing whatsoever that it either disrupted the on-going relationship between the Company and Union[16] or that it even seriously disrupted the Company's business operations. Accordingly, the two employees' activity simply caused no significant interruption or disruption in the existing bargaining relationship and, therefore, Section 9(a) and its principle of exclusivity should not be employed to remove the employees' activity from the protection of Section 7.[17]

Nor do we believe the lack of complete unanimity between the Union and the employees demonstrates an incompatibility with the on-going collective bargaining relationship. To be sure, the employees chose to follow their publicity campaign, contrary to the desires of Union Representative Johnson, but at no time did Johnson denounce their action or demand they cease distributing their leaflets. And, when the two employees were fired, the Union moved quickly to file grievances in their behalf. The Union's support for Hawkins and Hollins sets this case miles apart

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[16]Indeed, the Union told Hawkins and Hollins they were free, as individuals, to take individual action (A. 81-83, 86).

[17]See Cox, *The Right To Engage In Concerted Activities*, 26 Ind. L.J. 319, 332 (1951): "Much can be said in favor of aggressive unions whose leaders are constantly pricked to action by militant minorities."

from many of those in which a union's actions demonstrated open conflict with the minority employee group.[18]

Furthermore, we submit that the two employees' refusal to participate in the on-going grievance process created no disruption to the bargaining relationship in this particular case. Had the employees refused to participate without conducting their own publicity campaign, their refusal would have been considered legally insignificant; had they cooperated and nonetheless continued their publicity campaign, the Company would still have discharged them. Moreover, their refusal to cooperate with the Union's grievance was surely an internal union matter, which the Company should not intervene in and use to buttress its discharge action. See *N.L.R.B. v. Wooster Division of Borg-Warner,* 356 U.S. 342. When the record evidence is carefully weighed, it shows a consistency in goals between the Union and Hawkins and Hollins and a divergence in tactics neither adversely affecting the Union nor disrupting the Union-Company relationship.

Unfortunately, the relatively simple factual setting of this proceeding is lost sight of by the Company and Board in their briefs to the Court. The Company raises the spectre that under the Court of Appeals decision it would have to bargain separately with racial minority groups, possibly dealing with each separate minority group claiming the right and that

[18]In fact, the Union supported Hollins and filed a grievance on his behalf despite his status as a non-member (A. 76).

the result would be separate agreements inconsistent to the existing collective bargaining agreement (Co. Br. 7-9, 14-15). Likewise, the Board discusses a myriad of bargaining possibilities wherein a majority representative may disagree with a minority group's bargaining position or its view of the existence of discrimination, and claims that independent bargaining would fragmentize the bargaining unit (Bd. Br. 20-26).

Most of the arguments made by the Company and Board are far too premature to be decided in this proceeding. It may well be that if a majority representative actually renounced a minority group's activity, or disagreed with that minority group's viewpoint in a dispute with the employer, or if the minority group proposed a solution which was contrary with either an existing collective bargaining agreement or to the majority representative's policy, then their activity would lose its protection under the Act. But, those problems are not present in this case. The Company was never put in the position of having to decide which of a multitude of representatives to deal with, nor was it ever faced with conflicting demands. Indeed, the evidence is so meager as to whether Hawkins and Hollins actually desired to bargain with the Company at all (see Note 7, *supra*), let alone to claim that their unannounced demands "put the Employer in any sort of quandary." *R. C. Can Co., supra,* 328 F.2d at 979.

Even assuming that Hawkins and Hollins aimed at bargaining with the Company, we do not under-

stand the Court of Appeals decision to authorize the conflicts and fragmentation raised by the Petitioners' briefs. The Court below stated (Pet. App. 29):

> Certainly collective bargaining must be orderly in the sense that no stable, meaningful agreement can be reached where various factions are free to make conflicting demands upon an employer.[19]

But, that is precisely the point involved in this proceeding: Hawkins and Hollins never presented anything to the Company which could be construed as inconsistent with Union demands. The Company fired them without ever listening to them.

We believe that if the Court of Appeals opinion is narrowly confined to the facts present before it, its ultimate conclusion makes great sense. It has prevented the Company from infringing on otherwise protected activity short of a demonstration that such activity presents identifiable conflicts to the employer or majority representative. And, it serves to encourage dissident employees to pursue their disputes within their own labor organization with some flexibility for divergence in approaches. So long as no conflict with the bargaining agent exists, the concept of exclusivity is not infringed.[20]

[19]It is interesting to compare the majority's decision with that of the dissenting judge's. Unlike the majority, the dissenting opinion would hold that racial minorities have an absolute right to enter into bargaining with their employer, which might well result in the problems raised by the Board and Company in their briefs. The majority opinion, however, does not follow this approach and neither does the Union.

[20]There is one aspect to the majority decision in the Court below with which the Union strongly disagrees. We do not believe that the employees' protection under the Act can or should depend on whether their majority representative has acted on their complaint "to the fullest extent possible by the most expedient and efficacious means," as required by the Court. Counsel for the Board and Company have amply set forth the impossibility of working with this standard and the Union agrees with their views. We do not believe this standard of union responsibility is at all necessary in measuring when an employee's otherwise protected activity becomes unprotected. Furthermore, at the point in time when actual conflict between demands can be demonstrated and the majority representative refuses to agree to dissident demands, the way is still clear to test whether that majority representative has acted in an "arbitrary, discriminatory, or . . . bad faith" manner and, thereby, breached its duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171 (1967). Given this employee protection against discriminatory union conduct, there is simply no need to add the substantial uncertainty to protected activity by making it depend, in part, on a union's perfection in problem solving.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should find that the Company violated Section 8(a)(1) of the Act by discharging employees Hawkins and Hollins for engaging in protected activity.

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Respectfully submitted,

DAVIS, COWELL & BOWE,

By BARRY S. JELLISON,

DAVID C. NEVINS,

Attorneys for Amicus Curiae

Department Store Employees Union, Local 1100.